

## HUMAN SERVICES BOARD

# INTRODUCTION

DAIL filed a Motion to Dismiss claiming there is no basis for corrective payments. Petitioner filed a responsive brief. This case is related to Fair Hearing 20,382. This decision is based upon the briefs and documentation provided by the parties.

FINDINGS OF FACT

1. The petitioner receives services through the Choices for Care (CFC) program. The Franklin County Home Health Agency hires and supervises the personal care attendants who care for petitioner through the CFC program.

2. Petitioner appealed an earlier decision by DAIL denying a variance request dated April 24, 2006 to allow his spouse to be paid as a personal care attendant. DAIL had denied the request primarily based on Medicaid provisions preventing payment to spouses for services.

3. In Fair Hearing No. 20,382, the Board determined that the waiver provisions of the CFC program allowed payment to spouses for attendant care services and remanded the case to DAIL with an instruction that petitioner's request for a variance be properly reviewed. The effective date of said decision is October 20, 2006.

4. The Findings of Fact in Fair Hearing No. 20,382 are incorporated herein.

5. DAIL reviewed petitioner's request for variance and granted petitioner a variance.

6. Petitioner's spouse then applied for employment with the Franklin County Home Health Agency and was hired on November 29, 2006.

7. J.C., Franklin County Home Health Agency executive director, detailed agency hiring policies. These policies include reference check, criminal background check, and vulnerable adult and child abuse registry checks. In addition, new employees are required to attend orientation prior to their first assignment. According to J.C., the agency completed the background checks in November 2006. Petitioner's spouse completed her orientation at the end of November 2006.

8. Petitioner's spouse became a paid personal care attendant for petitioner on December 4, 2006. Prior to that time, petitioner's spouse provided unpaid personal care services for petitioner.

9. The parties explored with Franklin County Home Health Agency whether petitioner's spouse could be made a retroactive employee. According to J.C., Franklin County Home Health Agency is unable to do so since they would incur IRS penalties.

ORDER

DAIL's decision to deny retroactive payments is affirmed.

REASONS

The Choices for Care (CFC) program is an 1115 Medicaid waiver program that was approved by the Centers for Medicare and Medicaid Services. The purpose is to allow recipients equal access to either nursing home or home based care. As part of the waiver, DAIL may allow payment to qualified spouses providing personal care attendant services. The CFC waiver does not automatically include all spouses as appropriate personal care attendants. See Section K, "Choices for Care" Demonstration Waiver Operational Protocol and Fair Hearing No. 20,382.

Because DAIL has not yet promulgated regulations setting out the criteria for a spouse to qualify as a personal care attendant, recipients need to request a variance to allow for payment to a spouse as a personal care attendant.

In Fair Hearing No. 20,383, the Board determined that the CFC waiver allowed DAIL to pay spouses for attendant care services. DAIL was instructed to review petitioner's variance request to determine whether the criteria were met to allow his spouse to be paid as a personal care attendant.

DAIL granted the variance. Petitioner's spouse was hired on November 29, 2006, but did not start as a paid personal care attendant for petitioner until she completed

her orientation. She was added to the payroll on December 4, 2006.

Petitioner is now seeking payment for the period stemming from his original request for a variance on April 24, 2006 until the day his spouse first worked as a paid personal care attendant on December 4, 2006. Petitioner believes that the provisions for corrective payments apply to his case.

In particular, 42 C.F.R. § 431.246 states:

The agency must promptly make corrective payments, retroactive to the date an incorrect action was taken . . . if-

(a) The hearing decision is favorable to the applicant or recipient; or

(b) The agency decides in the applicant's or recipient's favor before the hearing.

Vermont has incorporated these provisions at M152 which states:

The Department will reimburse a Medicaid recipient for his/her out-of-pocket expenses for covered medical services under the following conditions only:

- The recipient applied for benefits after February 15, 1973 and was denied; and
- The recipient was later granted Medicaid as a result of any review of the initial denial which resulted in its reversal (e.g. . . . appeal and reversal by the Human Services Board. . .).

In addition, Vermont excludes payments for certain services including "care and services ordered or prescribed by an immediate relative of the beneficiary". M152.1(E).

The corrective payments provision has typically been used to reimburse recipients for monies they<sup>1</sup> spent on treatment, medications, or services prior to the date of a favorable fair hearing decision. *Greenstein by Horowitz v. Bane*, 833 F. Supp. 1054 (S.D.N.Y. 1993) (directing reimbursement for monies paid for personal care services); *Kurnik v. Department of Health & Rehabilitative Services*, 661 So.2d 914 (Fla. App. 1st Dist. 1995 (reimbursement for prescription medications)).

Petitioner does not have any out-of-pocket expenses that can be reimbursed.

Petitioner relies upon *French v. DCF*, 920 So.2d 671 (Fla. App. 5th Dist. 2006) for the proposition that DAIL can directly pay petitioner's spouse for the personal care services she has provided. However, the *French* case does not apply in this situation. In the *French* case, the recipient was found eligible for a waiver program that allowed the

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<sup>1</sup>Corrective payments have been made when family members or charitable organizations have made payments on behalf of the recipient.

state to pay relatives for attendant care services. The recipient's mother was approved as a caregiver. Subsequently, DCF disenrolled the recipient from the program. The recipient prevailed at a fair hearing reinstating her to the waiver program including reinstatement of the compensation for her mother.

We are not dealing with a case in which the petitioner had been granted payment for his spouse only to have the agency change course to terminate those services. The ruling in Fair Hearing No. 20,382 only determined that DAIL's policy of excluding spouses from payment as qualified personal care attendants violated the CFC waiver. As a result, DAIL was ordered to make a decision on petitioner's variance request. There were no guarantees that a variance would then be granted. There were no guarantees that if a variance was granted by DAIL that petitioner would then meet the hiring criteria used by Franklin County Home Health Agency.

Accordingly, DAIL's decision not to directly pay for the attendant care services provided by petitioner's spouse is affirmed.

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